IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 556.

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OPPOSING MOTIONS TO AFFIRM.

I. The Motion of the United States, the Secretary of Agriculture and the I.C.C.

The Government argues (p. 6) that there is no merit to appellants' contention that the Commission could find undue prejudice only if there was substantial similarity of transportation conditions as between the points alleged to be preferred and those alleged to be prejudiced.

This is contrary to *United States v. Illinois Central R.R.*, 263 U.S. 515, 524 (1924); *New York v. United States*, 331 U.S. 284, 315-316, 350 (1947); *State Corporation*

Comm'n of Kansas v. United States, 184 F. Supp. 691, 698 (1959), and *Atchison, Topeka & Santa Fe Railway Co. v. United States,* 218 F. Supp. 359, 366 (1963).

> "The rule, as stated in *United States v. Illinois Central R.R., supra,* at p. 524, is that
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> > 'To bring a difference in rates within the prohibition of § 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions.' "

In *Atchison,* a very recent case, the Court stated at p. 366:

> "As plaintiffs have shown, and defendants [the United States and the Interstate Commerce Commission] do not dispute, both the Interstate Commerce Commission and the federal courts have ruled that undue prejudice or preference does not exist unless the transportation conditions with regard to the prejudiced and preferred points are substantially similar.
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> "It follows that the correct test of 'undue' preference or prejudice is whether those circumstances exist under substantially similar transportation conditions; it also follows that a finding of such transportation conditions is essential to the Commission's authority to find a section 3 violation."

Illinois Central and *Atchison* were cited with approval on this point by this Court's decision of December 7, 1965 in *Western Pacific Railroad Company v. United States,* No. 12, October term, 1965. In construing the provision of Section 3(4) of the Act, relating to discrimination between connecting carriers, the Court stated:

"Relief is warranted only if it also appears that differential treatment is not justified by differences in operating conditions that substantially affect the allegedly discriminating carrier. See *United States v. Illinois Central R. Co., supra,* at p. 521; *Atchison, Topeka & Santa Fe R. Co. v. United States,* 218 F. Supp. 359, 369."

The case upon which the Government principally relies for its contention is *Ayrshire Collieries Corp. v. United States,* 335 U.S. 573, 594 (1949). There, however, the Commission had made the precise finding that is lacking in the decision here under review:

". . . the Commission found that the transportation conditions over the single-line routes do not differ materially from those over the joint-line routes to the same destinations from other mines in the same group. . . ." (335 U.S. at 586)

It is not contended by appellants that the Commission must determine the lawfulness of rate relations in exact accordance with cost relations. It may disregard minor variations in cost, but the rule has been that substantial similarity, to be found by the Commission, is requisite to an order commanding rate equality. It is obvious that there is a point beyond which the disregard of cost differences would be arbitrary.[1] This is especially true when rates are very low, as in the present case, where the rates under attack were found by the Commission to be below out-of-pocket costs. Such rates (like short-haul rates) do

1. The importance attached by this Court to the element of cost differences in applying anti-discrimination provisions is well illustrated by the decision in *I.C.C. v. Mechling,* 330 U.S. 567, at 577: "Concretely, the provisions mean in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain" (J.S. 17, footnote.)

not yield sufficient revenue to permit of disregarding the greater expenses to the higher-cost point.

On page 5 of its Motion to Affirm, the Government says that in *Ayrshire* this Court held that in grouping stations and fixing rate differences between station groups, the Commission could consider the desirability of maintaining competitive opportunity among shippers "so long as it also took account of differing transportation conditions." In the present case, the Commission did not take account of differing transportation conditions as to the matter which controlled its decision, namely the supposed need to permit of the selection of a new location for the Washington Market on the basis of its having an equality of rates with all other points in the New York Metropolitan area (J.S. 48a).[2] This consideration was, inherently, one which would exclude consideration of comparative transportation conditions. The location of the new market place was unknown. Representatives of the City could not state where the new produce terminal would be located (Tr. 171). Indeed, as pointed out in the Jurisdictional Statement, counsel for the City and counsel allied with them took the position that transportation conditions to the site of a possible new produce terminal were immaterial (J.S. 17).

The Commission, therefore, made no finding of similarity of transportation conditions, and the record would not have permitted it to make such a finding.

None of these matters is denied in the Government's Motion to Affirm. Rather, taking note that the City has now decided upon the location (Hunt's Point) for its new terminal market, the Government states that it does not read the Commission's order as precluding appellants from filing

2. The Government concedes that this consideration was deemed by the Commission to be "especially important" (Motion p. 4) and the City of New York stated in its brief in the court below (R. 427) that the conclusion of undue prejudice ". . . was bottomed upon the disadvantage of New York City, as a locality, in competing with municipalities in the same commercial and urbanized metropolitan area for the relocation of the fresh fruit and vegetable market" (J.S. 10).

new rates to Hunt's Point when service thereto begins on a regular basis, that the lawfulness of those rates will present a separate question, not decided here, and that appellants may then introduce cost data relevant to that service (Motion p. 7). We shall comment on this statement *infra*. At this point, it is sufficient to notice that there is no challenge to the validity of the grounds of appellants' point concerning the lack of knowledge, consideration by the Commission, or finding, relating to comparative transportation conditions as between points alleged to be unduly preferred and a possible point at which a new produce terminal might be built by the City. Hence, even on the Government's statement of the rule (referring to the *Ayrshire* case) that the Commission may consider the desirability of maintaining competitive opportunity among shippers "so long as it also took account of differing transportation conditions," the Commission's order here must be held invalid; it did not take account of comparative transportation conditions in reaching its conclusion that a finding of undue prejudice should be entered so that the decision as to relocation of the Washington Market could be made on the basis of rate equality for any location that might be selected.

With respect to the comparative costs which the Commission did discuss, namely those in terminating produce at the Pennsylvania Produce Terminal (called the "Manhattan Piers" in the Government Motion) in relation to a typical New Jersey point, the Commission found, as the Government admits (Motion p. 3), that there was a cost differential of $63.25. This compares with rate differentials ranging from $33 to $57 per car (J.S. 12). It found also that all of the services embraced by the rates to the Pennsylvania Produce Terminal were lawfully included in such rates (J.S. 38a); hence the cost attributable to all such services was—as to this station—the relevant cost. It found also that no undue prejudice was shown to persons receiving shipments at that station (J.S. 47a). And even

the author of the majority opinion agreed that the City and its co-complainant failed to make out a case of undue prejudice from the standpoint of possible loss of tax revenue or employment (J.S. 22a). Hence, the only thing unaccounted for is the matter of the removal of the market. A finding of undue prejudice with respect to rates to the Pennsylvania Produce Terminal obviously could not have been based upon the necessity of rate equality to that point as a possible site for relocation of the produce market; the idea was to move the produce market away from that terminal. Yet the Commission found undue prejudice in the relation between the rates to this important station and those to a typical New Jersey station as to which it found transportation costs to be $63.25 per car lower.

In discussing the cost evidence, the Commission disregarded a difference of $14.14 in the cost of switching and floating to the Pennsylvania Produce Terminal as compared with switching to a typical New Jersey point—Henderson Street team tracks, Jersey City—on the ground that a difference of this amount may be found in any large rate group (J.S. 38a). It disregarded without explanation an additional difference of $12.29 between station costs at Jersey City and what it arbitrarily assigned as station costs for normal delivery at the Pennsylvania Produce Terminal (Appendix C, p. 37a). As to this, the Government states (Motion p. 6) that although the Commission "did not specifically mention this differential" its decision shows that it was aware of the total cost differential at the Produce Terminal "and it concluded that this amount was insufficient to outweigh the factors favoring the grouping of the New Jersey and New York stations." And it is argued that the "general considerations" relied upon to sustain the Commission's order are not affected by evidence "of an added small cost of this sort" (Motion p. 6). This, of course, views the $12.29 in isolation from other cost differences. The Commission had dismissed the $14.14 cost difference for switching and floating, as mentioned

above, on the ground that it was not unusual to find differences of this amount in any rate group. When $12.29 is added to that amount, there is, based upon these two factors alone, a difference of $26.43. The Commission did not say that such a difference may be found in any group. It just left the matter hanging. Moreover, the $12.29 differential in "normal delivery" costs resulted from a split of the station expenses by the Commission wholly without evidence, a matter to which we now turn.

The Government does not deny that the Commission made the apportionment of station costs between "normal delivery" and "extraordinary" costs without evidence. It says that appellants attack the Commission's apportionment of station costs under the misapprehension that the Commission's purpose in making the apportionment was to ascertain the cost of making team track delivery at New York so as to know station costs at the site of the new produce market, but that, in fact, the Commission's purpose was to discover whether a substantial part of the cost differential between the Manhattan piers and New Jersey could be recovered by an accessorial charge. The Government says that:

> "For this limited purpose, precise apportionment was unnecessary. All the Commission sought to show was that a 'substantial' amount of the station costs were recoverable, leaving a much smaller unrecovered cost differential to weigh against the factors favoring the group rate." (Motion p. 7)

Here, therefore, the Government is urging that while the Commission ascertained both costs (without evidence) it gave consideration to only one, that relating to a possible charge not in issue. The report in no way indicates that the Commission considered only the costs relating to such a possible charge and ignored that part of its apportionment which did relate to the rates in issue, the cost for ordinary

services under the line-haul rates. The Commission stated (J.S. 39a) that:

> "In view of the conclusions expressed above, it is necessary to determine whether the station costs of $62.65 are attributable solely to extraordinary pier services and facilities or whether a part of such costs would have been incurred in connection with ordinary station delivery."

Manifestly, it cannot properly be said that the Commission, in making the apportionment, had no interest in the cost for ordinary station delivery. This same conclusion is compelled by the title of the appendix in which the arbitrary cost apportionment was made (J.S. 53a) and by the statement of the Commission that an ". . . estimate of what is delivery cost at the New York piers and costs of normal station services has been made . . ." (J.S. 53a).

The statement that the Commission's purpose was to examine the extent of the extraordinary costs alone is the statement of counsel, not that of the Commission. The decision must be judged as it was written. *Securities and Exchange Comm'n v. Chenery Corp.*, 322 U.S. 194, 196 (1948). Moreover, the contention that the Commission considered only the costs for extraordinary services and completely disregarded its finding as to the cost of normal delivery is, at the very least, subject to the criticism of the findings condemned in *United States v. Chicago, M., St. P. & P.R.R. Co.*, 294 U.S. 499 (1935), with respect to which the Court found "lurking" in the report some phrases that tended to give support to the interpretation favored by the Government, but stated that:

> "The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requi-

site in the quasi-jurisdictional findings of an administrative agency."

That ruling should be applied here. Decision should also be guided by *United States v. Abilene & So. Ry. Co.*, 265, 274 (1924):

> "The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void." (p. 290)

All of the foregoing, we submit, demonstrates that the Government's Motion to Affirm does not validly answer the basic contentions set forth in the Jurisdictional Statement. And nothing said in the motion answers appellants' arguments as to the importance of the questions involved (J.S. 16-22). Notwithstanding these facts, further proceedings before the Commission at this stage may substitute for plenary consideration by the Court, a matter to which we now turn.

The Government's concession that the appellants are entitled to a hearing for the introduction of cost data relevant to transportation to Hunt's Point is, of course, an important concession to one of the basic contentions advanced by appellants. If this concession had been made in the court below, the order of the three-judge court may well have been quite different than that entered.

More than this concession, however, is required for the proper protection of appellants' rights. If the hearing for the reception of evidence of the cost of serving Hunt's Point were to be limited to a consideration of Hunt's Point alone (in relation to the New Jersey Points), appellants would not be assured of the right to a real and substantial consideration of the effect which should be given to transportation costs in determining upon rates to Hunt's Point. This is because it would unquestionably be argued that the Commission has already found that the rates to all New

York City points presently served shall be the same as to the New Jersey points involved, and that with this finding standing (as it would stand with an affirmance of the lower court's decision) Hunt's Point should not be singled out as the lone place in New York City having rates higher than those applicable to the group in general.

Since, under the Commission's theory of decision (the necessity for rate equality in the selection of a location for the new produce market) it is Hunt's Point which has proved to be the crucial place, the Commission's finding of undue prejudice to the miscellaneous stations in New York (which have proved to be of no consequence, none having been selected as the location for the new produce terminal) should not be permitted to render superficial and insubstantial its consideration of the costs and rates to Hunt's Point in relation to the New Jersey points involved. The consideration of the rates to the important new produce terminal, therefore, should be made with the entire rate adjustment to the New York area before the Commission.

Accordingly, in the light of the concession made by the Government and the relation thereof to the Commission's theory of decision, appellants respectfully suggest that the Court forthwith enter an order vacating the judgment of the three-judge court, with directions to remand the case to the Commission for further hearing and a finding of the comparative cost as between transportation to Hunt's Point (and any other relevant New York points) and the destinations alleged to be unduly preferred, and a determination of the lawfulness of rate relations as between Hunt's Point and other New York points, on the one hand, and New Jersey points, on the other. In the alternative, appellants respectfully request that probable jurisdiction be noted so that plenary consideration may be given to the questions presented in the jurisdictional statement.

II. The Motion of the New York Port Authority and New York City.

This motion puts much emphasis upon the traditional maintenance of rate groups at large cities, such as New York. However, the fact that stations have been grouped as to rates in general does not mean that variations with respect to rates on given commodities, such as fruits and vegetables, moving on exceedingly low rates, result in undue prejudice and preference in violation of Section 3(1) or that in determining whether they do so result, basic requirements for establishing a violation of Section 3(1) may be disregarded. (See J.S. 19.)

It is a common thing to have exceptions to the general practice of maintaining terminal group rates. The evidence shows examples of such exceptions at New York as well as at terminal groups of other cities (Tr. 314-323, Exs. 55, 56). In publishing the assailed rates on fruits and vegetables to New York, the railroads did not suggest a general departure from the practice of maintaining a common rate to the New York group. They simply filed an additional exception, and they did so because of the very low level of the rates involved. This was specifically approved by the shippers and receivers of the fruits and vegetables, those truly concerned with the rates.

These appellees do not relate their discussion of the group matter to the legal deficiencies in the Commission's order as raised in the Jurisdictional Statement.[3] They

3. It is said on page 8 of the Port Authority Motion that the Commission found that the rate differential could cause the removal of the "wholesale trade" from New York to New Jersey, that the wholesale trade is sometimes referred to in the Commission's report as the "wholesale market" and that this is not an organization over which the City of New York has any control. The Commission referred to "the decision" as to relocation of "the wholesale produce market" (J.S. 48a). Also, the author of the majority report, in his dissent to the division report, spoke of "the produce terminal" and said that:

> "A new produce market is only one of many *facilities* that may require community planning . . . and a huge investment

state that all pertinent principles of law have been settled by the decisions cited on pages 10 and 11 of their motion. One of these, *Baltimore & Ohio R. Co. v. United States,* 345 U.S. 146 is not pertinent. It dealt with reasonableness and not undue prejudice. The lower court sustained the order involved in the present case on the Commission's finding of undue prejudice alone (J.S. 8a).

Each of the other cases cited on pages 10 and 11 of the New York Motion did deal with undue prejudice, and each of the Commission's orders reviewed in those cases was supported by the finding of similarity of transportation conditions which is lacking in the order now under review. We have already noted this (*supra,* p. 3) as to *Ayrshire.* The next case cited is *Illinois Commerce Commission v. United States,* 292 U.S. 474. In that opinion the Court stated at page 482:

> ". . . the Commission found that the transportation conditions throughout the Chicago Switching District are substantially similar; that they are no more favorable to interstate movements than to intrastate movements within the District. . . ."

The next decision cited is *Virginian Railway v. United States,* 272 U.S. 658. In that case 45 mines on the Virginian Railway had the group rate to the West. The remaining 54 mines on the Virginian had rates so high as to be characterized by Virginian's counsel as "impossible" (98 I.C.C. 488, 491). At page 665 the Court said:

> "These 45 mines to which the western market has been thus opened, obviously, enjoy thereby an advantage over the 54 mines, *found to be similarly situated,* to which the market is closed. And the Commission has

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secured in part by public credit. The location of such *facilities* is not decided by happenstance . . . ." (J.S. 24a, italics added.) It is clear that the concept of "wholesale trade" is counsel's, not the Commission's.

found that the preference is unjust. In essence, the situation is the same as that considered in *United States v. Illinois Central R.R.*, 263 U.S. 515, 523, and *United States v. Pennsylvania R.R.*, 266 U.S. 191, 199." (Italics supplied.)

And at page 666:

"It was shown that a huge coal traffic moves from this territory, *under like operating conditions*, at the blanket rates which were voluntarily established by other carriers to serve mines similarly located." (Italics supplied.)

In the final case in appellees' list, *New York v. United States*, 331 U.S. 284, wherein the Commission had found that rates in general between the North and the South, higher in level than those within the North, were unduly prejudicial to the South, the Court stated, at page 315:

"Fifth. The Commission found that conditions peculiar to the respective territories did not justify the differences in the territorial class-rate structures. In reaching that conclusion it first inquired whether the differences in the costs of furnishing the railroad service in the several rate territories justified the existing differences in the levels and patterns of the class rate scales. The basis of its inquiry was a cost study submitted by its staff."

The Commission's conclusion was that there was little significant difference in the cost of furnishing transportation in the South as compared with the East (p. 322).

The New York appellees do not argue that the Commission, in the case now under review, made a finding similar to that made in the foregoing cases. Rather, they contend that the transportation is for very long hauls and that it is identical except as to terminal services in serving

New York as compared with New Jersey points.[4] Terminal operations are always very expensive. They have increased by 439% since the beginning of the period of inflation which started with World War II, while line-haul rates have increased only 91% (Exhibit 68). When rates are cut to the bone in an effort to recapture business lost to competing forms of transportation—as were the rates here involved—these terminal cost differences obviously have great significance to the lines which incur them and to their ability to meet competition by rate reduction. The Commission does not know what the costs are to the new produce terminal and, as shown above in response to the Government motion, its findings with respect to the costs in effecting delivery at the Pennsylvania Produce Terminal in Manhattan are fatally defective.

The Port Authority also states that appellants' argument as to the necessity for finding substantial similarity of transportation conditions amounts to a contention that the Commission may not require rate uniformity within a group where "any" variation of costs is shown in serving different stations. This argument has not been made by appellants. It is erected by these appellees to be knocked down by them. Appellants argue that *substantial* variations in costs may be reflected in rates, especially when the rates are on extremely low levels. They say also that, at the very least, the Commission should know what the cost

4. Appellees say (p. 3) that the complaint named 396 railroads as defendants (all but a few having no connection with the rates involved) that the Southern and Western lines took no part in the proceedings and that New York Central and Erie favored uniform rates. Southern and Western lines have no substantial interest in the substance of the complaint, the matter of equality as between New York and New Jersey. As is customary, they left the defense to the lines having the real interest. Central and Erie have little interest, if any, from the South, as to which the Pennsylvania is virtually the exclusive carrier (Tr. 381, 633, 634). Moreover, the position of these two roads may well have been dictated by their position in the port differential controversy in which it would have been against their interests, as lines predominantly serving New York, among the Ports, to have shown their high costs in New York harbor.

difference is before it orders the railroads to waive it. It does not know that cost as to the point which controlled its decision, the place at which the new produce terminal might be located, now known to be Hunt's Point.[5]

These appellees say that appellants contend that the complainants before the Commission had the burden of showing the costs involved in serving the 24 stations in New York City other than the Pennsylvania Produce Terminal and they refer, in support of that assertion, to page 14 of the Jurisdictional Statement. A reference to that page will show that no such contention has been made by appellants. They argued that the complainants before the Commission offered no evidence to prove competition or injury from the rate relation, with respect to the 24 miscellaneous stations and that, therefore, an obligation to show costs with respect to those stations never arose.[6]

New York appellees (p. 14) answer appellants' argument concerning the Commission's having acted without evidence in dividing the station costs between those for nor-

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5. The "chaotic rate situation" and the "impractical and unworkable rate structure" envisioned by appellees (Motion, p. 13) has no relation to the present case. Here the rates were agreed upon by the people who use them, the shippers and receivers of freight and the railroads. There is no evidence that they have found them to be in any respect impractical or unworkable.

6. The Port Authority endeavors to show (p. 7) the traffic importance of the 24 miscellaneous stations in "New York City" by reference to a finding that 1100 cars of vegetables subject to the $57 differential were delivered at stations "east of the Hudson River other than the piers" and another unsupported statement of the Commission. The $57 per car differential applies to many stations "east of the Hudson River" which are not in New York City. The Pennsylvania, which is substantially the only terminating railroad from the South to New York (Tr. 381, 633, 634), in practice delivers perishables in New York only at the piers, its produce terminal (Tr. 385). From the Southwest, the $57 differential does not apply at stations in New York other than the piers (Tr. 71-72). It is difficult to see, therefore, how vegetables in substantial volume and subject to differentially higher rates could be delivered to New York stations other than the piers from the origin territories the rates from which are in issue in this case.

mal services and those for extraordinary services by stating that the Commission might have rejected, "as did the Hearing Examiner," the railroads' cost showing on the ground that their figures failed to show "the necessary separation" as between costs of ordinary station services and extraordinary, and that instead of rejecting them as "flawed and unacceptable," the Commission, "in the interest of the railroads themselves," analyzed the "faulty figures" and developed accessorial costs. This attempt to excuse the Commission's having acted without evidence will not bear scrutiny. The Examiner had held that the railroads' evidence of station costs at the P.R.R. produce terminal covered services "not properly includible in the line-haul rate" (J.S. 37a). If this was correct, obviously the figures were faulty. But the entire Commission specifically held that the Examiner was not correct:

> "Contrary to the view expressed in the recommended report, it is not unlawful for the defendants to publish tariffs which extend to shippers, under the line-haul rate or charge, pier services and facilities which are accessorial in character. In this connection, section 6(1) of the Interstate Commerce Act provides that tariffs 'shall also state separately all terminal charges * * * and all other charges which the Commission may require.' In other words, there is no requirement that all such charges must be separately stated, but only such as 'the Commission may require.' In a number of proceedings, the Commission has refused to require the separate statement of accessorial charges. See, for example, *City of Philadelphia v. Baltimore & O. R. Co.*, 231 I.C.C. 21." (J.S. 38a)

Obviously, therefore, the appellees point that the railroads were required to and failed to make a separation of the costs, and that the Commission generously did it for them, is incorrect.

These appellees also state (p. 15) that the Commission authorized the railroads to recover $36.82 of the costs at the produce terminal by a new charge, and they again refer to the fragmentary cost difference of $14.14 as if it were the only remaining cost difference disregarded by the Commission; but it is not, as was pointed out in discussing the Government's motion (*supra*, pp. 6-7). Moreover, the establishment of an accessorial charge at the produce terminal would have no relation to the matter of securing proper compensation for transportation to Hunt's Point.

It is urged, without relevance to the issues raised, that the Commission's order permits the railroads to establish equality by increasing the rates to the New Jersey destinations. As the Commission found, the present charges "were established to enable the defendant carriers to regain traffic from unregulated motor carriers . . ." (J.S. 32a). And as the lower court pointed out, ". . . the record does not show how much rates can be increased without undue injury to the competitive position of rail shipment in relation to trucking." (J.S. 6a) The Florida interests, in their brief before the Commission, stated that:

> "The rail rates to destinations generally throughout Official Territory cannot be increased, in the light of the intensive motor-truck competition. Even the present level of rates does not permit the rails to share equally in the traffic, and any increase surely would deter a free movement of the traffic by rail." (p. 23)

Nothing in the motion of the New York appellees meets the legal points presented in the Jurisdictional Statement.

III. Conclusion.

It is respectfully submitted that the Court should enter the order suggested above, at the end of the discussion of the Government's motion, that is, that the Motions to Affirm be denied and (a) the judgment of the lower court be forthwith vacated, with directions to remand the case to

the Commission for further hearing and a finding of the comparative cost as between transportation to Hunt's Point (and any other relevant New York points) and the destinations alleged to be unduly preferred, and a determination of the lawfulness of rate relations as between Hunt's Point and other New York points, on the one hand, and New Jersey points, on the other; or (b), in the alternative, that probable jurisdiction be noted and the case be set down for plenary consideration by the Court.

Respectfully submitted,

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December 17, 1965.